BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

I.

Opinion of the Supreme Court of the State of Missouri.

The opinion of the Supreme Court appears at pages 33-48 of the record. The order denying the motion for rehearing and to transfer to the Court en banc appears at page 77 of the record.

II.

Jurisdiction.

The jurisdiction of this court is invoked under Section 240 (a) of the judicial code as amended by the act of February 13, 1925, Section 347 (a), Title 28, U. S. Code.

The date of the judgment of the trial court is 2/19/43. An appeal was duly perfected and there was a decision in the Supreme Court of the State of Missouri on 9/5/44. Motion for rehearing and to transfer to the Court was overruled on 11/13/44.

III.

Statement of the Case.

In the petition, at pages 2 to 5, is a statement of the case so far as the law and the facts are material to the consideration of the questions here presented. In the interest of brevity this statement is not repeated.

SPECIFICATION OF ERRORS.

I.

The trial court erred in refusing the appellant a continuance upon his showing that the jury was prejudiced against him at the time of the trial by reason of unfavorable newspaper publicity, labor affiliations, and numerous jury investigations by different agencies, as well as the comments of the Acting Circuit Attorney, which were given wide publicity in the local papers before the trial.

II.

The trial court erred in admitting evidence against the appellant in the nature of secret reports, confidential investigations, conclusions of witnesses, hearsay evidence and audits of books which were admittedly not made by the appellant or under his direction.

III.

The trial court erred in permitting the Circuit Attorney to read from an instrument of writing which purported to be grand jury notes in the presence of the jury under the guise of refreshing the memory of the State's witness.

IV.

The trial court erred in refusing to permit the attorney for the appellant to cross-examine the state's witnesses as to their bias or prejudice against the appellant.

V.

The trial court should have sustained the demurrer of the appellant at the close of the case, should have granted a new trial, and the Supreme Court should have reversed

the cause for the reason that the evidence in this cause was wholly insufficient to sustain the issues and the indictment.

VI.

The indictment in this cause was defective in that it did not properly inform the defendant of the charges which he was forced to meet.

VII.

The Supreme Court of the State of Missouri erred in failing to take into consideration the unwarranted, unprecedented and unjustified tactics of the Circuit attorney to obtain a conviction in this cause.

SUMMARY OF ARGUMENT.

A.

Specification of Error I.

The evidence in this cause shows that the defendant was not granted a fair and impartial trial because of the unparalleled newspaper publicity which was given to the case; the labor affiliations of the jury panel and because of the fact that panel and the whole jury system was being investigated at the very time this defendant was forced to trial. We are aware of this honorable court's rulings in many cases holding that the granting of a continuance is discretionary with the trial court, but this Court has also said many times that this is only the rule when there is not a GROSS ABUSE OF DISCRETION. The defendant introduced many inflammatory articles from the local newspapers in regard to the jury system, to other defendants in this cause, and also introduced evidence showing the different investigations which were being conducted at the time of this trial. All of this evidence together with the fact that 78 jurymen had to be called before 24 could qualify (which qualification was challenged then and now by the defendant) was disregarded by the Supreme Court of the State of Missouri. The following authorities are cited in support of this specification: 14th amendment to the Constitution of the United States, Article 2 Section 22, Constitution of the State of Missouri.

22 C. J. S. Section 497;

Seay v. State, 93 So. 403, 207 Alabama, 453;

McDaniel v. Commonwealth, 205 S. W. 915, 181 Kentucky, 766;

Fountain v. State, 107 A. 554, 135 Md. 77, 5 A. L. R. 908;

State v. Rasor, 167 S. E. 396, 168 S. C. 221, 66 A. L. R. 1237;

Mickle v. State, 213 S. W. 665, 85 Tex. Cr. 560;

16 Corpus Juris, Note 25;

State v. Taylor, 8 S. W. 2d 29;

State v. Owens, 259 S. W. 100;

Goldsby v. United States, 160 U. S. 70;

Pickett v. United States, 216 U. S. 456;

Reynolds v. United States 98 U. S. 145;

Paschen v. United States 70 Fed. 2d 491;

Allen, et al. v. United States, 4 Fed. 2d 698.

Specification of Error II.

The decision of the Supreme Court of the State of Missouri holding that the hearsay evidence used to convict this petitioner was not error is in conflict with the decisions of this Court and every State Court. There was no denial of the fact that the Witness Blecker (who was the chief witness against this appellant) used records not made by this petitioner, nor under his control or at his direction. Secret and confidential reports were used and the defendant was denied the right to see them, or to cross-examine the witnesses against him. The witness was allowed to testify, over the objection of the defendant, to surmises and guesses. An instance of this was the witness testifying to a certain book which contained "blank pages", counting the lines and deducing from them that so many members were initiated into the Union. This and other testimony which was permitted by the trial Court is the rankest sort of hearsay evidence. It is also called to this Court's attention that the police department of the City of St. Louis sent out letters to different people, not known to the defendant, asking them questions about their payments etc., and the answers received were used by the

auditor Blecker to arrive at his conclusions as to the embezzlement.

In support of this specification we cite the following authorities.

14th amendment to the constitution of the United States;

6th amendment to the constitution of the United States;

State v. Gallina, 178 S. W. 2d 433;

Article 2, Section 22, Missouri Constitution;

People v. Nutter, 237 N. W. 384, 255 Mich. 207;

State v. Bigham, 131 S. E. 603, 133 S. C. 491;

Delayney v. U. S., 44 S. Ct. 206, 263 U. S. 586;

People v. Sorrells, 127 N. E. 651, 293 Ill. 591;

State v. Crooker, 122 A. 865, 123 Me. 310, 33 A. L. R. 821.

Specification of Error Number III.

It was error for the Supreme Court of the State of Missouri to fail to give consideration to the appellant's assignment of error pertaining to the use of the grand jury notes by the Circuit Attorney. This again bears upon the question of the right of the defendant to face his accusers. The record discloses that the Circuit Attorney under the guise of refreshing the memory of a witness read from what was called grand jury notes, over the objection of the defendant. The defendant asked to see the document but that privilege was denied him. The State was attempting to impeach its own witness and got the evidence before the jury.

In support of this contention the defendant refers the Court to the authorities cited under specification number two as well as the following.

State v. Johnson, 22 S. W. lc. 465;

State v. Baker, 20 Missouri 224;

McClellan v. Richardson, 13 Me. 82;

State v. Bowen, 172 S. W. 367;

State v. Burke, 132 Mo.

Hickory v. United States, 151 U. S. 303;

Clancy v. Transit Co., 192 Mo. 615;

State v. Patton, 255 Mo. 245, 164 S. W. 223;

State v. Gadwood, 342 Missouri 466;

State v. Gregory, 339 Mo. 133;

State v. Murphy, 345 Mo. 358.

Specification of Error Number IV.

The Supreme Court erred in failing to hold it error for the trial Court to deny the defendant the right to cross-examine the witness Coyne and other witnesses who were members of the Union and who testified for the state. The defendant sought to ask him questions to show his bias or prejudice or his interest in the case, if any. The question which the court refused the defendant was whether or not the witness thought that the defendant embezzled any money from the Union. The jury always has the right to know the interest of a witness in a case, and certainly the defendant had the right to show why the witness testified as he did.

In support of this contention we cite the following authorities.

Amendment Number 14 United States constitution;

Shepard v. United States, 290 U. S. 96;

Furlong v. U. S. 10 Fed. 2d 492;

State v. Johnson, 163 S. W. 2d 780;

State v. Pruett, 144 Mo. 92;

State v. Decker, 143 S. W. 544;

State v. Thornhill, 177 Mo. 691;

Dotterer v. State, 172 Ind., 357, 88 N. E. 689, 30 L. R. A. (NS) 846.

Specification of Error Number V.

The Supreme Court of the State of Missouri erred in holding that the evidence in this case was sufficient. As we shall show later, that there was absolutely no showing of the defendant's guilt, except a so-called confession, which the defendant strenuously objected to and which was obtained by trickery. The confession introduced was not a confession of the crime which the defendant was charged with. It stands then, that the state never proved the corpus delicti in this cause. The State depended upon hearsay and circumstantial evidence. By inuendo and presumptions and unfair tactics the State managed to convict this defendant, but taking the evidence in its entirety we submit that the State should never have been allowed to go to the jury.

The defendant's demurrer should have been sustained.

In support of this specification we cite the following cases, and authorities.

The 14th amendment to the constitution of the United States;

Paschen v. United States, 70 Federal (2d) 491.

Specification of Error Number VI.

Your petitioner respectfully insists to this Honorable Court that the indictment in this cause failed to inform the defendant of the charges which he was forced to meet. That the Supreme Court of the State of Missouri in ruling on a companion case said that the indictment was "lengthy and verbose, covering 10 pages of the State's Brief * * * * We agree with the appellant that the indictment is somewhat confusing. * * * * It contains much surplusage and many repetitions." This was taken from the Case of State v. Hill, decided by division number 2 of the Missouri Supreme Court on April 3, 1944. In the Hill case just mentioned a demurrer and a motion to quash the indictment was filed by the defendant, but the Court held that

the proper remedy was to file a motion to strike. This the petitioner did. In spite of this attempt by the petitioner to comply with the ruling of the Court, the Court completely disregarded his allegations as to the indictment. In support of this specification the petitioner cites the following authorities.

Amendment number 14 to the United States Constitution;

Section 22 of Article 11, Constitution of Missouri;

State v. Burke, 60 S.W. 1100, 150. 568;

State v. Flint, 62 Mo. 393;

State v. Harroun, 98 S.W. 467;

31 C. J. pp. 793, 812;

State v. Flyn, 258 Mo. 220;

State v. Reakey, 62 Mo. 40;

State v. Meysenburg, 71 S.W. 229;

State v. Stegner, 207 S.W. 626;

State v. Adams, 274 S.W. 21, 308 Mo. 664;

State v. Brown, 296 S.W. 125;

State v. Kellman, 123 S. W. 2d l.c. 72.

Specification of Error Number VII.

The extremes which the Circuit attorney went to in this case in order to secure a conviction is unparalleled in the annal of our Courts. Space does not permit your petitioner to go into the record fully as he did in his original brief and motion for rehearing, but we wish to call the Court's attention to the fact that this defendant was not granted a fair and impartial trial by reason of the acts of the Circuit Attorney (the agent of the State of Missouri, and therefore the State). Your petitioner contends that it is not only the duty of the agents of the State to see that jus-

tice is done to the State, but also a citizen of that State whose life or liberty is at stake. No one can condemn a prosecutor for his deal and determination to convict a guilty man, or for using every available ethical and fair means to see that the public is protected and the guilty are given the punishment which they deserve for their misconduct. On the other hand it is a violation of the most sacred rights of our land for a representative of the government, out of personal animosity or an attempt to gain glory for himself, to resort to trickery, unethical, unfair, and fraudulent practices in order to convict, a man is entitled to a fair trial by a jury of his peers.

In support of this contention we cite the following authorities and cases:

14th amendment to the Constitution of the United States;

Article II, Section 22 of the Constitution of the State of Missouri;

State v. Owens, 259 S.W. 100;

State v. Couch, 98 S.W. 2d 550;

State v. Nicholson, 7 S.W. 2d. 375;

State v. Jones, 268 S.W. 83, 306 Mo. 437.

ARGUMENT.

Your appellant respectfully submits to this Honorable Court that the instant cause is one of the most unusual in the history of this nation. The cause was set for trial on May 11, 1942 at which time the defendant asked for a continuance on the grounds that the public mind was prejudiced against him by reason of newspaper articles, jury investigations and labor affiliations. It was necessary to examine seventy-eight (78) veniremen before twenty-four men could be selected as competent to try the issues. Fifty-four men were excused because of the fact that they had read the inflammatory articles which were carried in the local papers or for the reason that they had formed an opinion as to the guilt of the defendant. The appellant set out in his brief to the Supreme Court of the State of Missouri the various named jurors that were allowed to remain upon the panel even though they admitted that they had read the articles and were interested in the case. We submit that the rights of the defendant were not protected and that he was forced to trial before a jury that was admittedly biased, coerced, and partial.

We respectfully refer the Court to the appellant's brief beginning upon page 80 in which such statements as "St. Louis Rotten Jury System", "Criticism of the Jury System to be laid before the Grand Jury" and many other such headlines were being carried in the local papers at the time that the defendant was forced to trial, over his objection and protest. Many of the panel testified that they had read these articles, but said that they could render a fair decision nevertheless. We submit that no man could have read these articles and editorials, been subjected to questioning by various agencies and still be able to sit impartially. It is beyond all bounds of reason that any

man mentally capable of sitting upon a jury would not realize (even though he stated otherwise) that he was involved in a very unusual case. The Supreme Court in its opinion sets out that the newspaper articles were so inflammatory as to cause several investigations, but go on to say that the result of the investigations showed that the jury system was upheld. This was not the point raised by the defendant. We contended, and still contend, that the investigations, newspaper articles, and statements by the circuit attorney (in addition to the fact that the jury was improperly called) all denied the defendant a trial by a fair and impartial jury as guaranteed him by the Constitution of this State and of the United States. It makes no difference whether the investigations disclosed that the St. Louis Jury system was not "rotten". The only point involved was whether or not the jurymen could be impartial in the light of the pressure which was brought to bear upon them before and at the time of this trial.

In this connection we would like to quote from the case of Paschen vs. United States, 70 Fed. 2d, 491 in which a continuance was asked upon the grounds of inflammatory news articles against the defendant which appeared in the press. In that case Judge Alschuler said:

"The reprehensibility of the publications, as stated by the Government, extends not only to the publications themselves but as well as disclosures and information stated in the article to have been made by "Government Men" and "Government agents" as the authority for the publications. Government men and government agents have no more right in advance of trials to reveal such information than have the newspapers to publish it. *It is unfair for persons about to go on trial for their liberty*, and to the Government, whose plans of procedure are thus made public. * * * * * * what is said herein is prompted not alone by what occurred, but as well by the great frequency of similar infractions of the individual and public rights and interests. We said this in effect in Allen, et al. vs. United States, 4 Fed. (2d) 698, (but strangely enough) it seems the *reprehensible practices go merrily along.*

We agree that the disposition of the motion was within the sound discretion of the Court. *The record here does not disclose whether any of the jurors had read or heard of these particular articles* and we cannot say that the Court's discretion was abused in its denial of the motions."

Such was not the case in the instant cause. We have heretofore set out in the original brief in the Supreme Court of the State of Missouri the extracts from the examination of the jury in which it is shown that practically all the panel had read the inflammatory articles and many of them had formed opinions. Just as in the Paschen case, the Circuit Attorney Morris made statements to the press, which were bound to have affected the public mind.

Your petitioner urges this Honorable Court to consider the nature of the evidence used against him which has been heretofore set out. We call attention to a recent decision of the Supreme Court of Missouri wherein the States used the same tactics as were used in this case and the same type of evidence was permitted to be used in the trial of the cause. The Court said in the Case of State vs. Gallina, 178 S. W. 433 "In respect to the issue the State and the accused occupy essentially different positions. An accused is entitled to the full weight of, among others, the constitutional provisions of which the English people boast, reading: * * * the accused shall have the right * * * to meet the witness against him face to face * * * * * Mo. Const. Art. 2, Section 22; State vs. Butler, 247 Mo. 685, 153 S. W. 1042, 1044 (1) * * * * * The only evidence offered on the witness' non-residence were statements made to the assistant Circuit attorney by a third party. Even though statements made by an absent witness of his moving to another State be considered acts and not hearsay, *testimony of what some third party said was clearly hearsay.*" The judgment of the trial court in this case was reversed for the above error. How can this Court reconcile that decision (which is the fundamental law of the land) with the judgment of the Supreme Court of the State of Missouri when the States' own witness admitted

that he had used letters furnished by the Circuit Attorney's office to arrive at his conclusions as to what the defendand had done? All of this testimony was objected to and exceptions were saved.

The use of the Grand jury notes by the prosecuting attorney in an attempt to impeach his own witness and to get evidence before the Jury which they should never have heard, is inexcusable and manifestly error. It violates the most sacred rights of this nation. What will happen if the people of this country know that no longer is the testimony given by them before grand juries kept secret as provided by the statutes?

In the case of State vs. Patton, 164 S. W. 233, the Supreme Court of the State of Missouri said: "Our bill of rights as written in our constitution, provides that an accused person upon his trial has the right to be confronted with his accusers. What was done here violated the right of confrontation. * * * * In the case at bar, the learned and diligent prosecuting attorney read verbatim to the witnesses Moore and Qualls, and to other witnesses for the State, question after question and answer after answer from the paper which the attorney stated was the transcript of the testimony of these witnesses before the grand jury. As to one or more of the witnesses the transcript of the witness' testimony was not identified by him, nor its identity otherwise appear, either as being the record of the grand jury, or as being a true copy of the testimony of such witness before that body, but the State plunged in medias rea and began reading the answers from the paper to the jury, merely pausing occasionally to ask the witness if he had made such answers before the grand jury. For these reasons which we labor to make clear, *this was prejudicial error for which the case must be reversed.*"

We agree with this statement of the law by the Supreme Court of the State of Missouri, and submit that the decision in the instant case was clearly in conflict with the opinion, especially in view of the fact that the Court in its opinion did not even see fit to comment upon the question.

There is no more firmly established right than that of a defendant to cross examine witnesses against him to show their interest in the outcome of the case or their bias and prejudice against him. In this case the defendant was denied that right. He was not permitted to ask the State witnesses who were union members whether or not they thought that the defendant had stolen from them, which would surely have shown their interest and their bias if their answer had been "yes".

In the case of Furlong v. United States, 10 Fed. 2d, 492, the Court in passing upon this question said, "No rule is better established than the right to show the bias and prejudice of a witness towards a party to the suit as a part of his cross examination" * * * It is elementary doctrine that hatred, interest, and ill will are among the most potent forces in coloring testimony."

We believe that the rule as stated above is decisive of this case, and that for this reason, if no other, the judgment of the Supreme Court of the State of Missouri should be reversed.

We have heretofore set out in the original brief in the Supreme Court of the State of Missouri and this record is here before this Honorable Court, in relation the sufficiency of the evidence upon which this defendant was convicted. We have searched the records in vain and have not been able to find a case wherein a person was deprived of his liberty on such flimsy and incompetent evidence as was introduced by the state in this case. The *only* testimony of any consequence was given by the auditor, Blecker, and we have previously shown that that evidence was hearsay and not admissible in evidence. This defendant was charged with embezzlement of a huge sum of money, but it was never shown that he had the money in his possession. After the investigation was started Hill and the other officers brought in a large sum of money, that they had in *their possession*. None was found upon the defendant or in his possession. The fact is that the State failed utterly to show what amount was taken and by whom.

The indictment in this case is absolutely ununderstandable. It is not only verbose and confusing as the Supreme Court of Missouri said, but after diligent study it is not clear just what this defendant was convicted of or tried for. We submit to this Honorable Court that a reading of this indictment will show that this defendant was not properly informed against. The defendant attempted by every legal means provided in the State of Missouri to compel the State to properly inform against him by demurrer, by motion to quash, and by a motion to strike. He was denied this right, in the face of the previous opinion of the Court in a companion case wherein the same indictment was passed upon, and the Court stated in substance that a motion to strike the surplusage was the proper remedy to correct the defects in the indictment.

Your petitioner pointed out in his original brief and motion for a rehearing in the Missouri Supreme Court the specific instances of the misconduct on the part of the Circuit Attorney Morris, but the Supreme Court saw fit to disregard the assignment and not pass upon it at all. We still feel that in a great democracy such as the United States a citizen is entitled to the constitutional guarantees afforded him. The Circuit Attorney in this cause had just previous to the trial of the defendant, lost the Jenkins case which was a companion case to this case. His acts therefore showed that he was highly incensed and thought that he should have won the Jenkins case. He talked to the Press, stating that the jury system was rotten in St. Louis, he called for grand jury investigations, he employed private investigators, he hurled all sorts of accusations at the board of jury supervisors—finally forcing them to meet to defend and exonerate themselves. It is significant that when he was called upon to substantiate his charges he could not do so. What other purpose could he have had in mind than to vindicate himself in the eyes of the public and inflame the public mind against the rest of the defendants? After all these statements and acts of the Circuit Attorney had been called to the attention of the public, he HAD to win the instant case to save his self-respect. The Circuit Attorney did not stop with the above

acts; he went still farther. He personally called a panel of jurors to try this defendant, contrary to the rules laid down by the laws of the State of Missouri. He segregated a portion of the panel. During the trial of the case he resorted to every trick and ruse possible in his attempt to browbeat witnesses, place in evidence incompetent and hearsay evidence to the extent that the Supreme Court of the State said in its opinion that "We say however, without hestitation that the practice is UNETHICAL AND IMPROPER AND SHOULD NOT BE TOLERATED BY TRIAL JUDGES". The court was referring here to the practice of the Circuit Attorney in calling the jurors by their given names. It was also shown that on many occasions the Circuit Attorney had to be rebuked by the trial judge, and the jury instructed to disregard his statements. On one occasion he withdrew his statements, BUT THEY STILL WERE BEFORE THE JURY. Your petitioner respectfully states that he cannot see how the Supreme Court of the State of Missouri could reconcile its judgment with the facts as set out in the opinion and as shown in the record in this case.

In the case of State vs. Nicholson the Supreme Court of Missouri had this to say in regard to the conduct of prosecuting attorneys: "It is commendable for prosecuting attorneys to be deeply interested in enforcing the law and to use their utmost ability and knowledge to see that the State is properly represented, BUT IT IS ALSO THEIR DUTY TO KEEP IN MIND THE FACT THAT THAT THE DUTY OF A PROSECUTING ATTORNEY IS NOT THAT OF A PARTISAN ADVOCATE, BUT IS HIS DUTY TO TREAT THE DEFENDANT FAIRLY UNDER ALL CIRCUMSTANCES AND TO CONDUCT THE TRIALS ON THE PART OF THE STATE IN SUCH A WAY AS TO LEAVE NO ROOM FOR CRITICISM AS TO THE METHODS USED IN TRYING TO SECURE CONVICTIONS. It is much more desirable to retain confidence in the purpose of the courts and other officers of the law by fair and just means than to try to secure convictions in case at all hazards." This we believe is a sound statement of the policy of the law and we believe the court should have followed it.

CONCLUSION.

Your petitioner respectfully submits that the decision of the Missouri Supreme Court is clearly in conflict with the former decisions of that State, with the decisions of this Court, with the Constitution of the State of Missouri and of the United States. We further submit that if no one of the petitioner's specifications of error are sufficient to have this matter reviewed by this honorable Court, this Court should consider the whole, and for all the errors appearing taken collectively, the judgment of the Supreme Court of the State of Missouri in this cause should be reversed.

Respectively Submitted,

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